

Supreme Court, U. S.  
FILED

MAR 14 1977

MICHAEL ROBAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

\_\_\_\_\_  
No. 75-1805  
\_\_\_\_\_

GARLAND JEFFERS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

\_\_\_\_\_  
ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT  
\_\_\_\_\_

**PETITIONER'S REPLY BRIEF**  
\_\_\_\_\_

STEPHEN C. BOWER  
202 N. 3rd Street  
Kentland, IN 47951  
(219) 474-5121

*Court-appointed  
Attorney for Petitioner*

## TABLE OF CONTENTS

*Page*

### PETITIONER'S REPLY ARGUMENT:

Reply to Government's Argument II — conspiracy is a lesser included offense to a continuing criminal enterprise .....	1
Reply to Government's Argument III — Jeffers did not waive his double jeopardy rights and that a conviction on a lesser included offense bars prosecution on the greater .....	5
CONCLUSION .....	8

### TABLE OF AUTHORITIES

#### *Cases:*

Iannelli v. United States, 420 U.S. 770 (1975) .....	1
People v. Krupa, Calif., 149 P.2d 416 (1944) .....	6
Robinson v. Neil, 409 U.S. 505 (1973) .....	3,7
Robinson v. Neil, 366 F. Supp. 924 (E.D. Tenn. 1973) .....	7
United States v. Papa, 533 F.2d 815 (2d Cir.), cert. denied, ____ U.S. ____ (1976) .....	3
United States v. Dinitz, 424 U.S. 600 (1976) .....	6

#### *Other Authority:*

21 U.S.C. §848 .....	2,3
----------------------	-----

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

---

No. 75-1805

---

GARLAND JEFFERS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

**PETITIONER'S REPLY BRIEF**

---

The Petitioner, Garland Jeffers, responds to Arguments II and III as contained in the Solicitor General's Brief.

The Government's position in Argument II A. (Brief, pages 18-32) is that *Iannelli v. United States*, 420 U.S. 770, is controlling. This 1975 decision permitted conviction of a 1955 gambling offense and a 371 conspiracy. The government points out that the *Iannelli* decision held that the statutory requirements of the gambling offense did not require proof of a conspiracy, and therefore the traditional Wharton's rule did not

apply. The government then claims that the wording in the continuing criminal enterprise offense also does not require proof of a conspiracy, and thus Iannelli controls. The definition of a continuing criminal enterprise requires that a series of drug violations be undertaken "in concert with five or more other persons" with whom the violator occupies a position of manager and from which substantial income is derived. 21 U.S.C. §848. Petitioner, in his original brief, emphasized to the Court, that the definition of a continuing criminal enterprise contained an element of conspiracy. Petitioner has argued that a series of drug violations taken "in concert" with five or more means that there must be some agreement. The government's response is that the phrase "in concert" does not mean that there must be an agreement. Petitioner simply points out that "in concert" means an agreement, and the presence of the phrase "in concert" can not be ignored.

Also, in regard to Argument II A., the government has conceded that the Seventh Circuit was in error in holding that Iannelli created a new double jeopardy rule concerning complex statutory crimes. (See Government's Brief, p. 22, n. 10.) Therefore, the government does not attempt to uphold the analysis and reasoning of the Seventh Circuit when it held that the lesser included offense rule should not apply to complex statutory crimes. See Petition for Writ, Appendix p. 15. The government's justification of multiple prosecutions is simply that a conspiracy is not a lesser included offense of a criminal enterprise and even if it is such prosecution is not prohibited by the double jeopardy clause.

Argument II B. focuses on some of the legislative background of the continuing criminal enterprise statute. The argument is that Congress intended to have separate offenses for conspiracy to distribute and a continuing criminal enterprise. Congress obviously enacted two prohibitions, but the simple fact that two statutory provisions are involved does not make them separate for double jeopardy purposes. Petitioner argues that the *Gavieres-Blockburger* test is still controlling. In other words, the statutory definitions of the two crimes must be examined to determine if they are the same for double jeopardy purposes. Jeffers concedes that Congressional intent may be relevant on multiple punishments. But on the issue of multiple prosecutions, the Court has to determine, under traditional doctrines, if the offenses are the same. This is not determined on whether there are two statutes' violations, but rather if one of the crimes is a lesser included offense of the other. Jeffers has contended that a §848 criminal enterprise is a continuing offense, and that its underlying base is a conspiracy. The statute requires, as an essential element, that the series of drug violations be done "in concert" with others. Thus, there is a statutory requirement of a conspiracy. The lesser included offense rule is an accepted double jeopardy doctrine and if Congress includes a conspiracy as an element in a continuing criminal enterprise multiple prosecutions are prohibited. See *Waller v. Florida*, 397 U.S. 387 (1970) and *Robinson v. Neil*, 409 U.S. 505 (1973).

Argument II C. focuses on punishment cases as decided by several of the various Circuits. See cases cited in *United States v. Papa*, 533 F.2d 815 (2d Cir.), cert. denied, \_\_\_\_ U.S. \_\_\_\_ (1976). Petitioner



contends that the multiple punishment cases which do not result from multiple prosecutions are not controlling on this case.

Argument II D. acknowledges that a continuing criminal enterprise "does not fit comfortably into the mold of conventional double jeopardy analysis." Government's Brief, page 28. The government appears to argue that because a criminal enterprise requires a series of violations of any of the drug laws none of the laws are necessarily required to be violated. Petitioner argues that one essential element of a criminal enterprise is that whatever series of violations occur that they are undertaken "in concert" with others. Thus, every criminal enterprise prosecution will require the proof that there was an underlying conspiracy. Jeffers would also direct the Court's attention to the indictment and that Jeffers was charged with undertaking "such (drug) distribution in concert with five or more other people with respect to whom he occupied a position of organizer, supervisor and manager. . . ." See Appendix, page 3. The government has argued that only §841 substantive offenses were charged in the indictment; this is not accurate. Jeffers' indictment clearly and concisely lists concerted action as an element of the continuing criminal enterprise. The statute requires concerted action and the indictment charged concerted action.

The gist of Argument II is that conspiracy is not a requirement of a continuing criminal enterprise. For this to be true the language "in concert" as appears in the statute will have to be construed to mean "not in concert". It is unreasonable to ask this Court to construe a statute to read the opposite of the language it contains. Thus, a conspiracy is a lesser included offense of a continuing criminal enterprise.

Argument III A. appears in the Government's Brief, pages 33-39. All of Argument III assumes that a conspiracy is a lesser included offense but argues that the second prosecution is still valid. Argument III A. claims that Jeffers' objections to the trial together prevented the government from being able to prosecute him in one trial. Jeffers would point out to the Court that the objections to the trial together were filed by all of the defendants in the conspiracy case. Jeffers was one of these defendants and joined in the motion. The basis of the motion was that there would be prejudice to all of the defendants if the conspiracy case were tried with the criminal enterprise case. The trial court agreed and did not allow the consolidation for trial. The government claims that Jeffers "succeeded in blocking consideration of the conspiracy and the continuing enterprise charges in a single trial." See Government's Brief, pp. 33-34. This is simply not accurate.

Jeffers argues that his objections to a consolidation of the two charges was to protect his Sixth Amendment right to a fair trial. Jeffers claimed prejudice if he were tried with the ten other defendants in the conspiracy indictment. The other defendants in the conspiracy case claimed prejudice if they were tried with the two charges against Jeffers. Jeffers' claim was not basically that his two charges could not be tried together, but that the presence of the other conspiracy defendants would be prejudicial. See Appendix, pp. 15-24. The government's contention is that Jeffers made a "deliberate, tactical decision to oppose a single trial on both indictments." Government's Brief, p. 38, n. 21. This is not correct, and the government's interpretation of what occurred is also not correct. The objections to

the trial together could only have prevented a joint trial of all ten conspiracy defendants with Jeffers on the continuing criminal enterprise charge. This action is not at all like a defendant requesting a mistrial with its obvious consent to a retrial. See *United States v. Dinitz*, 424 U.S. 600 (1976).

The government is at fault for the successive prosecutions. The government could have requested that Jeffers be severed from the conspiracy trial, and that he be tried alone on both of the charges. The government had to option to try Jeffers with the rest of the conspiracy defendants or to sever him and try him alone. The government chose to try Jeffers on the conspiracy charge first. Jeffers contends that when the government proceeds to trial on the lesser offense, instead of the greater offense, it is without right thereafter to prosecute on the greater. See *People v. Krupa*, Calif., 149 P.2d 416 (1944). Also, the government could have dismissed the conspiracy charge and simply tried Jeffers on the heavier charge. The decision to try Jeffers on the conspiracy charge prior to the criminal enterprise charge was made by the government and not by Jeffers. Jeffers contends that this type of piecemeal prosecution is precisely what the Constitution prohibits.

The government has cited at length from cases dealing with retrial problems following mistrials and successful appeals. See Government's Brief, pp. 33-37. These holdings are not relevant to a case of multiple prosecution and conviction.

Argument III B. contends that there may be successive prosecutions. That is, the government claims "that prosecution for the greater offense is always permissible after conviction on the lesser, so long as the

defendant is not placed twice in jeopardy for either offense." Government's Brief, p. 39. The government seems to claim that it may prosecute from the bottom of the ladder to the top. This Court's decisions in *Waller v. Florida*, 397 U.S. 387 (1970) and *Robinson v. Neil*, 409 U.S. 505 (1973) are incorrect if the government's position is followed. Piecemeal prosecution is illogical and unconstitutional. On remand the trial Court in *Robinson v. Neil*, 366 F. Supp. 924, 928 (E.D. Tenn. 1973), made this clear:

If the State were allowed to initiate separate prosecutions against a defendant for every crime up the ladder from the lesser to the greater offense, the potential for abuse and oppression would be too great to be tolerated in a society concerned for the rights of the individual. The double jeopardy clause stands as a bar to such a potential.

## CONCLUSION

In conclusion, Jeffers contends that the government has failed to show that the phrase "in concert" in the continuing criminal enterprise statute does not mean what it says. Jeffers argues that a conspiracy is an essential element of a criminal enterprise, and that the lesser included offense rule applies to the multiple prosecutions of Jeffers.

Jeffers contends that there is no valid authority for the government's position that a conviction on a lesser included offense does not bar prosecution for the greater. The authority is to the contrary. Jeffers requests this Court to reverse his conviction for a continuing criminal enterprise and hold his prosecution barred by the double jeopardy clause.

Respectfully submitted,

STEPHEN C. BOWER  
202 N. 3rd Street  
Kentland, IN 47951

*Court-appointed  
Attorney for Garland Jeffers,  
Petitioner*